No. 11,765

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE THOMAS,

Appellant,

vs.

FURNESS (PACIFIC) LIMITED (a corporation), and SHAW, SAVILL & ALBION, LTD.,

Appellees.

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

I.
PLEADINGS AND FACTS ESTABLISHING JURISDICTION OF THE COURT BELOW AND OF THIS COURT

Plaintiff, a longshoreman, filed his complaint in the state court alleging an injury suffered while working on board the SS Fordsdale on May 21, 1946 (R., pp. 3-4). The defendant named was Furness (Pacific) Limited (hereinafter referred to as "Furness"). Thereafter, on petition of Furness, a corporation of British Columbia, the case was removed (R., p. 8) to the district court on grounds of diversity, the necessary jurisdictional amount being in controversy. In the district court, Furness made a motion for summary judgment (R., p. 9) supported by

an affidavit of James West, its general manager (R., p. 11). The motion and supporting affidavit set forth that Furness was not the owner or owner *pro hac vice* of the Fordsdale and was not liable on any other ground for any injuries that plaintiff may have suffered. The motion prayed judgment in favor of Furness on the ground that there was no dispute as to any material fact as to liability of Furness, even assuming that plaintiff had in fact been injured. This motion was filed on September 13, 1946. (R., p. 10, p. 13). On December 10, 1946, plaintiff moved to add as a defendant the owner of the vessel, namely, Messrs. Shaw, Savill & Albion, Ltd. (hereinafter referred to as "Shaw") (R., p. 13). On March 3, 1947, the district court made its order granting the motion and ordering that summons issue (R., pp. 16-17). Plaintiff then purported to serve Shaw by leaving a copy of the summons and complaint with James West, General Manager of Furness, at the offices of Furness in San Francisco (R., p. 23). Defendant Shaw immediately filed a special appearance and a motion to quash service of summons (R., p. 23-4, p. 25). The special appearance and motion to quash were supported by a second affidavit of Mr. West (R., p. 25).

A hearing on the motions of both Furness and Shaw was held on March 21, 1947, at which Mr. West testified and was examined by counsel for all parties. (R., p. 37 and following).

At the conclusion of the testimony and after arguments of counsel, both motions were submitted. Thereafter the district court granted both the motion of Furness for summary judgment and the motion of Shaw to quash

(R., p. 30), the order being entered May 2, 1947 (R., p. 30). Plaintiff filed notice of appeal July 5, 1947 (R., p. 31).

On the foregoing facts, the District Court had jurisdiction pursuant to 28 U.S.C.A. Section 71 and 28 U.S.C.A. Section 41 (1) as amended (Judicial Code, Section 24, as amended). This court has jurisdiction pursuant to 28 U.S.C.A. Section 225(a) (Judicial Code, Section 128, as amended).

II.

SUMMARY OF ARGUMENT

Appellee Shaw contends that it was not, and could not be, properly served with summons by civil process in an action *in personam* in state or federal courts in California. Except where a foreign corporation consents to service, it must be doing business in the state where served to the extent necessary to justify the inference that it is present there if it is to be subject to service of such process. Shaw has never done business to this extent in California. Even if this is not so, Shaw had ceased to do business in California before it was joined and served and furthermore neither Mr. West nor Furness was in fact its agent at the time Shaw was joined and served.

As to Furness, there is no dispute as to any material fact regarding its relationship to the SS Fordsdale at the time of appellant's injury. This relationship was such as to establish that appellee Furness as a matter of law is not liable to appellant for his alleged injuries.

In the Argument following, headings A, B, and C present points supporting appellee Shaw. Heading D supports appellee Furness.

III.
ARGUMENT

A. Shaw has never done business in California to the extent necessary to subject it to jurisdiction in personam in State or Federal Courts in California. This is perfectly clear on the authorities and alone disposes of the appeal as to Shaw.

Under Federal Rule of Civil Procedure 4(d)(3), service upon a foreign corporation shall be made

> "by delivering a copy of the summons and of the complaint to *an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and,* if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." (Italics supplied)

Under Federal Rule of Civil Procedure 4(d)(7), service upon a foreign corporation is also sufficient if

> "the summons and complaint are served in the manner prescribed by any statute of the United States or *in the manner prescribed by the law of the state in which the service is made* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." (Italics supplied)

The relevant California statute is section 6500 of the Corporations Code, formerly Section 406 of the Civil Code, providing as follows:

> "Process directed to any foreign corporation may be served upon the corporation by delivering a copy *to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary,*

the general manager in this state, or the cashier or assistant cashier of a bank." (Italics supplied)

Service of process pursuant to this section is limited by Section 411 of the Code of Civil Procedure to corporations doing business in this state. These provisions must also be read in the light of constitutional limitations on the power of state or federal courts to render personal judgments against foreign corporations. It is well settled that a state or federal court may not, without violating respectively the due process clause of the 14th or 5th amendments, render a personal judgment against a foreign corporation which has not consented to service of summons upon it unless the corporation is *doing business,* as that phrase has been judicially defined, *within the state or within the jurisdiction of the federal court* at the time the service is made. The principle is succinctly stated in *People's Tobacco Company v. American Tobacco Company,* 246 U.S. 79, 62 L. Ed. 587 (1918), quoted with approval in *Consolidated Textile Corp. v. Gregory,* 289 U.S. 85, 77 L. Ed. 1047 (1933), where it is said, 246 U.S. at page 87:

> "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted."

The following are the facts of record bearing on the question:

(a) Shaw is a corporation organized and existing under the laws of Great Britain (R., p. 25);

(b) Shaw does not now have, and never has had, offices or property in California (R., p. 25, p. 69), other than the Fordsdale herself;

(c) Shaw is not now, and never has been, qualified to do business in California (R., p. 25, p. 69);

(d) Shaw has not now, and never has had, employees who are residents of California (R., p. 27);

(e) Vessels owned by Shaw have never called at California ports, except for the visit of the Fordsdale in 1946 (R., p. 25, conceded in appellant's brief p. 16).

(f) After redelivery of the Fordsdale to her owners by the British Ministry of War Transport on April 24, 1946, the vessel was in California ports for a total of eight days, all on the same voyage. (R., p. 42, 43). She loaded during that period approximately 20 per cent of a full cargo (R., p. 68).

(g) The regular business of Shaw is operating steamships between the United Kingdom and ports of Australia and New Zealand (R., p. 69). The Fordsdale was not ordered to San Francisco by her owners but by the British Ministry of War Transport or the United States Navy (R., p. 65-66).

The question to be decided is not a close or difficult one under the authorities. Whatever the minimum character and quantum of business that must be done to subject a foreign corporation to jurisdiction *in personam,* it is clear that that minimum was not reached here. Shaw was not voluntarily entering into the regular business of carrying cargo to and from ports of California. In loading a cargo here, it was simply making the best of the situation in which it found itself when the Fordsdale was released from requisition in San Francisco.

Shaw could hardly be required to send the vessel home to England empty.

It is of course conceded that the absence of qualification by Shaw to do intrastate business in California does not establish its immunity to the jurisdiction of California courts, or of federal courts sitting in California.

See:

Taylor v. Navigazione Libera Triestina, 95 F. 2d 907 (C.C.A. 9, 1938)

But where, as here, a foreign corporation has not qualified and hence in effect consented to suit in the state by designating an agent to receive service of process, it must engage in a continuous or regular course of business in the state to be subject to suit *in personam.* Of the liability of a corporation foreign to Kentucky to suit in courts of that state, the Supreme Court said, in *International Harvester Co. v. Kentucky,* 234 U.S. 579, 583, 58 L. Ed. 1479, 1481 (1914):

> "It has been frequently held by this court, and it can no longer be doubted, that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the state. St. Louis Southwestern R. Co., v. Alexander, 227 U.S. 218, 226, 57 L. Ed. 486, 488, 33 Sup. Ct. Rep. 245, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with, and that the corporation is actually doing business within the state."

And in 234 U.S. at 585, 58 L. Ed. at 1482:

> "In order to hold it responsible under the process of the state court, it must appear that it was carrying

> on business within the state at the time of the attempted service. As we have said, we think it was. *Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction.*'' (Italics supplied)

Something more than sporadic or isolated visits by Shaw vessels in California ports is required to confer jurisdiction in personam against Shaw.

There are numerous decisions dealing with the application of the general principle to the case of foreign corporate shipowners. In *Holliday v. Pacific Atlantic Steamship Corp.,* 354 Pa. 271, 47 A. 2d 254, 1946 A.M.C. 1048 (1946), the Supreme Court of Pennsylvania held that a Delaware corporation, four of whose ships visited Philadelphia in the course of one year, was not liable to suit *in personam* in Pennsylvania. It affirmed the trial court's order setting aside service of process, which had been made upon R. A. Nicol & Company, an agent hired by the defendant to service its ships in Philadelphia. The case is quite similar on its facts to the one at bar. The court said, 47 A. 2d at 256, 1946 A.M.C. at 1050-1:

> ''From the beginning of 1944 until August 25th, when his evidence was given, the Nicol Company handled four ships operated by defendant but belonging to the War Shipping Administration. Mr. Nicol testified that his company was paid 'agency fees on a ship basis.' He stated that his company had 'no contract' with defendant. The understanding was '* * * they would pay me so much in the way of fees per

ship.' His company rendered no services for the defendant except on the specified occasions.

* * * * * * * * * *

The work which the Nicol Company did for defendant from time to time as occasion presented itself was, in the words of defendant's counsel, 'turning a ship around' but there is not enough in the record to sustain in our courts a judgment *in personam* against the defendant foreign corporation: compare *Shambe v. Del. & H.R.R.R. Co.,* 288 Pa. 240, 135 A. 755."

There calls of four of defendant's vessels over an eight-month period were considered an insufficient quantum of business to support personal jurisdiction.

In *Mason v. Moore Line Ltd.,* 1928 A.M.C. 1768 (D.C. Ore., 1928, not reported elsewhere), a British shipowner was held not to be subject to suit *in personam* in Oregon even where the master of one of its vessels was served there. The complaint sought recovery for the death of a resident of Oregon on board one of defendant's vessels in the harbor of Portland. The defendant's vessels visited Oregon ports at irregular intervals as required by time and voyage charterers. The court relied largely upon *Moore Dry Goods Co., Inc. v. Commercial Industrial Co., Ltd.,* 282 F. 21 (C.C.A. 9, 1922), a decision of this court wherein the general rule requiring a continuous course of business to sustain jurisdiction was recognized.

See also:

W. Bartholomew and Co. v. Rederi A/B Gefion, 1946 A.M.C. 538 (Commissioner's report, S.D. N.Y., 1944, not elsewhere reported);

Urlin v. W. R. Chamberlin Co., 1948 A.M.C. 84 (Superior Court, Wash., 1947, not elsewhere reported).

In the foregoing cases, the quantum and character of business done by the foreign corporation were below the minimum necessary to sustain jurisdiction *in personam.* In the cases which follow the minimum has been considered reached.

In *Socony Vacuum Oil Co. v. Superior Court,* 35 C.A. 2d 92, 94 P. 2d 1019, 1939 A.M.C. 1500 (D.C. of A., 1939) the opinion does not clearly set forth the extent of defendant's activities in California, but says (94 P. 2d at p. 1020):

> "*From the statement of facts presented it appears that petitioner was transacting more than one isolated act of business in the state of California.* Its business here was similar to the ordinary business transacted in its home port, New York, and was of sufficient substantial character to bring it within the purview of actively 'doing business in this state'. Code Civ. Proc. sec. 411; Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 P. 289; Davenport v. Superior Court, 183 Cal. 506, 191 P. 911; Milbank v. Standard Motor Construction Co., 132 Cal. App. 67, 22 P. 2d 271; Winfield v. United Fruit Co., 135 Cal. App. Supp. 791, 24 P. 2d 247." (Italics supplied)

The court denied the shipowner's petition for a writ of prohibition restraining the trial court from entering a default in plaintiff seaman's personal injury action.

In *Jenkins v. Lykes Brothers S.S. Co.,* 48 F.S. 848 (E. D. Pa., 1943), a seaman sued his employer for damages for personal injuries. Lykes, the employer, moved to vacate service made upon Charles Kurz & Company, its agent in Pennsylvania. Lykes had no office and no employees in Pennsylvania. But thirty-five of its vessels had

called at Philadelphia over a two-year period. The court denied the motion to vacate service, saying, at page 849-50:

> "The first contention of the defendant Lykes is that it is not doing business in Pennsylvania. It is conceded that if it is doing business, the fact that such business is purely interstate commerce does not render it immune to suit. International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479.
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> * * * * *
>
> Lykes is, qualitatively speaking, clearly doing business in Pennsylvania when it transports cargoes to and from Philadelphia, even though it maintains no offices here. *Quantitatively speaking, the fact that it has been so engaged for a period of over ten years and that during a recent two year period thirty-five of its ships have called at the Port of Philadelphia is sufficient to constitute doing business in Pennsylvania as distinguished from mere occasional or sporadic activities.* Cf. Cafasso v. Philadelphia & R.R. Co., C.C., 169 F. 887; The Hanover, D.C., 6 F.2d 335; Marcum v. Owens-Parks Lumber Co., D.C., 31 F. Supp. 748." (Italics supplied)

In *Marcum v. Owens-Parks Lumber Co.,* 31 F.S. 748, 1941 A.M.C. 630 (W.D. Wash., 1940), a motion to quash service was denied where the defendant's vessel called regularly at ports within the state. The court relied upon a decision of the Supreme Court of Washington, saying, 31 F. S. at 748:

> "Under the statutes of Washington service may be had upon a foreign corporation by serving an agent if the corporation is doing business within the

state. Remington's Revised Statutes of Washington, Sec. 226, subsection 9.

Of the nature of the business to be transacted, the Supreme Court of Washington has said, in Lucas v. Luckenbach Steamship Co., 1927, 141 Wash. 504, 508, 252 P. 526, 528:

> 'We have adopted the rule that, for a corporation to come within this statute, the business transacted by it must be a part of its usual or ordinary business, and must be continuous in the sense that it is distinguished from merely casual or occasional transactions. Rich v. Chicago B. & Q. R. Co., 34 Wash. 14, 74 P. 1008; State ex rel. Wells Lumber Co. v. Superior Court, 113 Wash. 77, 193 P. 229, State ex rel. Yakima Trust Co. v. Mills [140 Wash. 357], 249 P. 8.
>
> 'That the appellant, in the visits of its steamships to Everett, was transacting its ordinary and usual business is beyond question. This question need not be further argued. No hard and fast rules can be laid down as to when a corporation transacts sufficient of its business to bring it within the statute. *Manifestly, if a ship calls at a port but once a year, it is transacting business there only casually or occasionally.* But, as its calls become more frequent, there must come a time when the court can say that it is doing business at that port within the contemplation of the statute.' '' (Italics supplied)

Oro Navigation Co. v. Superior Court, 82 A.C.A. 1017, 187 P.2d 444 (D. C. of A., 1947),

relied upon heavily by appellant (pages 17, 18, 19, 28 of appellant's brief), is not in point. There the defendant had done business in California in the required sense

in the past, and the court only decided that, when served, the defendant had not effectively withdrawn from the state. In the very passage from the opinion quoted in appellant's opening brief (at page 18), the court recognized the principle for which we contend (187 P. 2d at 446):

> "Service of process upon a corporation must be made at a place wherein the court which issued the process has obtained jurisdiction in a legal mode prescribed by the statutes of the place of service or by the provision of a United States statute. . . . Judicial decisions often express this rule by stating that the corporation must 'be present' within the jurisdiction where service is made at the time of service. . . . *'Presence' means transacting business which is not an isolated transaction.*" (Italics supplied)

The foregoing cases are uniformly persuasive that *calls by a vessel on a single voyage at ports within a state are "casual", "isolated" or "sporadic" transactions quantitatively below the minimum required for a finding that the shipowner is doing business in the jurisdiction.* Furthermore, the decisions of the Supreme Court on the more general question of what constitutes doing business require a finding that Shaw never has done business in California to the extent necessary to give the courts here jurisdiction in personam.

The Supreme Court case most nearly in point is *Rosenberg Brothers v. Curtis Brown Company,* 260 U.S. 516, 67 L. Ed. 372 (1922). There service was made in New York upon the president of an Oklahoma corporation which had no offices and no employees in New York

and was not qualified to do business there. Although the evidence was in dispute as to whether the president was in New York on the business of the corporation, the court decided the case on the premise that he was, holding even so that a motion to quash service had been properly granted by the district court. It said, 260 U.S. at 518, 67 L. Ed. at 375:

> "The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the state. Compare International Harvester Co. v. Kentucky, 234 U.S. 579, 58 L. Ed. 1479, 34 Sup. Ct. Rep. 944; People's Tobacco Co. v. American Tobacco Co. 246 U.S. 79, 62 L. Ed. 587, 38 Sup. Ct. Rep. 233, Ann. Cas. 1918C, 537. *And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial.* Compare Chipman v. Thomas B. Jeffery Co. 251 U.S. 373, 379, 64 L. Ed. 314, 316, 40 Sup. Ct. Rep. 172."

This entire subject was carefully reviewed by Mr. Chief Justice Stone in *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L. Ed. 95 (1945), cited at page 15 of appellant's brief, wherein a foreign corporation was held to have sufficient "minimum contacts" with Washington to justify collection of an unemployment compensation tax by an action in personam in Washington state courts. There the salesmen of the foreign corporation had been engaged for several years in a

continuous course of soliciting business in Washington. Regarding the question of what "minimum contacts" are required, the court said in part (326 U.S. at 318, 90 L. Ed. at 103):

> "Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 67 L. Ed. 372, 43 S. Ct. 170, other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit, Cf. Kane v. New Jersey, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30; Hess v. Pawloski, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 641, supra; Young v. Masci, 289 U.S. 253, 77 L. Ed. 1158, 53 S. Ct. 599, 88 A.L.R. 170, supra."

It is of course true that legislation may *under special circumstances* provide for some form of substituted service on a non-resident individual or corporation without violating due process, even where the normally required "minimum contacts" are not present. The use of automobiles creates such a danger to the general public that statutes providing for substituted service on non-resident owners, individual or corporate, have been uniformly upheld as a valid exercise of the police power of the states, and not violative of due process under the fourteenth amendment.

Kane v. New Jersey, 242 U.S. 160, 61 L. Ed. 222, 37 S. Ct. 30 (1916);

Hess v. Pawloski, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 641 (1927);

Young v. Masci, 289 U.S. 253, 72 L. Ed. 1158, 53 S. Ct. 599 (1933).

So here, a statute of California, or a federal statute if confined to interstate or foreign commerce, providing for an approved form of substituted service on a nonresident shipowner might well be upheld, at least as not violative of due process, as to suits for personal injuries sustained by longshoremen on vessels in California waters. But in the state of the authorities discussed above, it would be an unjustified invasion of the legislative field for this court to hold that Shaw is liable to suit in California when it has never engaged in such a continuous course of business here as to establish the "minimum contacts" necessary to a finding of doing business.

Certain other contentions of appellant should be mentioned:

(1) Appellant says (brief, p. 12-13) that since he sues for a maritime tort the question of personal jurisdiction over Shaw is to be determined by the rules of maritime law. Our answer is that appellant is mistaken, but that, even if he is right, the rules applicable in an admiralty court are no different from the corresponding rules of law.

We agree that maritime rules of substantive law govern maritime causes of action, even in a law forum.

Garrett v. Moore-McCormack Company, Inc., 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1937);
Intagliata v. Shipowners & Merchants, etc., Co., 26 C. (2d) 365, 159 P. (2d) 1 (1945)

But the power of an admiralty court to render a judgment in personam against a foreign corporation is no greater than that of the same court sitting at law. The requirements of due process as to a finding of corporate presence must be met regardless of forum and of the character of the cause of action.

If by his argument on this point appellant means that, assuming corporate presence within the jurisdiction, he may in a suit on the law side serve process in any manner proper in the same court sitting in admiralty, he might as well contend that the Supreme Court Admiralty Rules apply in the law court, so long as the cause of action is maritime. The suggestion is obviously unsound.

We conceive the correct rule to be that the uniformity required by the *Garrett* case, *supra,* extends to matters of substantive law only and that having chosen the law forum, appellant must comply with the Federal Rules of Civil Procedure as to matters procedural in character.

(2) Appellant says (brief, p. 15):

> "No unfairness attaches to subjecting Shaw to the jurisdiction of the Court in this case, where the purpose of such jurisdiction is to compel Shaw to respond for a tort committed within the jurisdiction, particularly where, as here, Shaw has full knowledge and can respond as easily here as anywhere else."

Under the proposition contended for, an individual or corporation would be held liable to suit in any jurisdiction where he or it commits a tort, and service within the jurisdiction would be unnecessary if the tortfeasor has actual notice of the suit. Any such view is repug-

nant to the fundamental requirement of personal service as a basis of jurisdiction recognized in *Pennoyer v. Neff*, 97 U.S. 714, 24 L. Ed. 565 (1878) and scrupulously followed since.

Furthermore, it is manifestly inaccurate to say that Shaw "can respond as easily here as anywhere else." Appellant blandly overlooks the fact that the crew of the vessel, who would alone have any knowledge of the alleged injury to appellant, are employees of Shaw (R., p. 66), a corporation of Great Britain (R., p. 25), and are not, and never have been, residents of California (R., p. 27). Shaw would have to bring witnesses from England.

(3) Appellant says (brief, p. 20):

> "The argument could be offered that Shaw could not be compelled to respond to any judgment since it lacks funds in the jurisdiction, but is not the answer to that question to subject Furness to liability on behalf of Shaw? Furness, having accepted the benefits of Shaw's business certainly should be held accountable for Shaw's acts, and between themselves it is not unreasonable that Shaw and Furness will work out the question of financial responsibility should plaintiff prevail after a trial on the merits."

The suggestion would compel an agent to respond for all torts of its principal. To state the proposition is to refute its legal soundness. Even if plaintiff had a trial on the merits below, he would have to go to England to collect a judgment. And there, presumably, the judgment would be open to contest on the ground that it was rendered by a court having no jurisdiction. Ap-

pellant under such circumstances would be no closer to recovery than he is now.

On the authorities, then, it is clear that the calls of the Fordsdale in California ports in 1946 were an isolated transaction outside of the regular course of Shaw's business, and quantitatively below the minimum necessary to give the district court jurisdiction *in personam* over Shaw. As a matter of fairness, Shaw should not be subjected to suit in a jurisdiction where it cannot produce its witnesses. And to permit suit *in personam* against Shaw would be to compel the district court to perform an idle act, since appellant would still have to sue in England to collect a judgment.

B. Even if Shaw did business in California to the necessary extent in May 1946, it had effectively withdrawn from California when it was joined in the present action in March 1947.

The visit of the Fordsdale to California ports occurred in April and May 1946 (R., p. 42-43). Shaw was not joined as a party to the present action until March, 1947 (R., p. 16), almost a year later. Shaw's withdrawal from California had long since been complete.

In *Conley v. Mathieson Alkali Works,* 190 U.S. 406, 47 L. Ed. 1113 (1903), service upon a foreign corporation was held properly set aside when made three and a half months after the corporation had ceased doing business in the state.

See also:

Phillips Co. v. Superior Court, 20 P.2d 717 (D. C. of A., Cal., 1933, not elsewhere reported).

While it is obvious that no moment can be arbitrarily fixed at which a corporation can be deemed to have withdrawn (absent a specific statute on the point), it seems clear that a corporation present in the state for about 8 days (the approximate period of the Fordsdale's visit while under the control of her owners, (R., p. 42, 43) has withdrawn when a reasonable period has elapsed thereafter. It is also plain that under these circumstances a reasonable period is something less than ten months.

Section 6504 of the Corporations Code has no bearing on this question, since it provides for service of process only upon corporations which have done *intrastate* business in California and thereafter withdrawn. There is nothing in the record to suggest that Shaw's business in California was other than foreign in character.

See:

Texas Transportation, etc., Co. v. New Orleans, 264 U.S. 150, 44 S. Ct. 242, 68 L. Ed. 611 (1924);

Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90, 58 S. Ct. 72, 82 L.Ed. 68 (1937).

For the same reason, *Oro Navigation Company v. Superior Court, supra,* has no application here, for there the court found (187 P. 2d at 447) that the shipowner's business had intrastate aspects.

C. Even if Shaw did business in California to the necessary extent and had not withdrawn from California when joined in the present action, personal service was not properly made upon it.

Under Federal Rule 4(d)(3), quoted *supra,* service upon a foreign corporation must be made upon an "officer," "a managing or general agent," or upon "any other agent

authorized by appointment or by law to receive service of process." Under Section 6500 of the California Corporations Code, quoted *supra,* service upon such corporations must be made upon "the person designated as its agent for service of process or authorized to receive service of process," or upon an "officer of the corporation," or upon "the general manager in this state."

It is apparent from the record that Mr. West, upon whom service was made, was not in fact within any of these definitions. He was "Pacific Coast Manager" of Furness (R., p. 37). He had no connection with Shaw whatever after the accounts with respect to the Fordsdale were wound up in August 1946, except to notify Shaw of this suit (R., p. 70).

In *Holland v. Parry Navigation Co.,* 1947 A.M.C. 1435, 7 F.R.D. 471 (E.D. Pa., 1947, not elsewhere reported), service on a foreign corporation was made by leaving the summons with an agent who acted for the defendant on a "ship to ship" basis, caring for defendant's vessels at the port of Philadelphia under an informal arrangement similar to the one in the present case. When served, the agent was not engaged in servicing any of defendant's vessels. Applying the Federal Rules and a statute of Pennsylvania similar to the California statute referred to above, the court quashed service on the ground that the person served was not acting as an agent when served. The court said (1947 A.M.C. at 1437-8):

> "I think that on May 23, 1946, when service was made on Rice, there was no relationship of principal and agent in existence between Parry and Rice. As I have previously indicated, Rice performed duties for

Parry on a ship to ship basis. It seems to me that the nature of the authority conferred upon Rice by Parry can be viewed in either of two ways: First, that the authority was to exist for a specific time—namely, the duration of the vessel's stay in the Port of Philadelphia, plus any length of time prior to its arrival or subsequent to its departure during which business matters with respect to the vessel which Rice handled for Parry would normally have to be attended to; or, that the authority conferred on Rice was to perform a specified act or to accomplish a specified result—the expeditious "turning around" of Parry's vessel. In either view of the nature of Rice's authority, I think it is clear that since Rice had completed the transaction of its last previous item of business for Parry on May 12, 1946, the authority of Rice to act as Parry's agent had terminated before May 23, 1946, when service was made on Rice. Restatement of Agency, secs. 105-106."

See also:

Moody v. Seas Shipping Co., 1947 A.M.C. 431 (D.C. W.D. Wash., 1947, not elsewhere reported).

In Oro Navigation Company v. Superior Court, *supra,* where service upon the shipowner's agent was held to be sufficient, the holding was based partly on the fact that the shipowner, having represented (on the shipping articles which constituted plaintiff seaman's contract of employment) that the corporation served was its agent, was estopped to deny that service on the agent was proper. See 187 P. 2d at page 446:

"Furthermore, it is through petitioner's conduct in describing General Steamship Corporation, Ltd., as

> 'Operating Mgrs.' on the articles, that Anderson caused summons to be served upon General Steamship Corporation, Ltd. Code of Civil Procedure, Section 1962, subd. 3, provides: 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission be permitted to falsify it'."

Of course in the present case Shaw never made any representations of any kind to appellant.

It is clear that, when Shaw was joined in March, 1947, neither Mr. West nor Furness was within any of the classes of persons named in the rule as proper to receive service upon a foreign corporation.

D. The motion for summary judgment in favor of Furness was properly granted.

A vessel owner or owner *pro hac vice* owes a duty of care to longshoremen to provide a safe place to work, and, under recent decisions of the Supreme Court, is liable even without negligence for injuries to longshoremen caused by unseaworthiness.

> *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 (1946).

But Furness was obviously not an owner or an owner *pro hac vice* of the Fordsdale. Under an informal understanding not in writing, Furness undertook with Shaw, the owner, to *arrange for* provisions, fuel, berthing, loading of cargo and such repairs as the master might request while the vessel was in California ports. (R., p. 11-12). The crew of the vessel were employees of Shaw, the owner (R., p. 12).

Furness had no responsibility for navigation, upkeep or repair of the vessel (R. p. 13). Any repairs made in San Francisco were requested and approved by the master or chief engineer of the vessel, and Furness was not required or qualified to make any inspection. (R., p. 67). The chief officer of the vessel was in charge of stevedoring operations (R., p. 68). Under these facts, it is plain that Furness was at no time in possession or control of the vessel. The relation of Furness to the various vessels which it served is summed up by saying that Furness was "agent" for such vessels in California (R., p. 38). But it is plain from the record that if Furness had undertaken to make repairs to the Fordsdale without the master's permission, or to instruct the crew how to perform their duties, it would have been going beyond the scope of its employment and would have become a trespasser on the vessel. Under these circumstances, how can it be suggested that Furness is liable for defective conditions on board the vessel or for the negligence of the vessel's crew? Certainly an agent is not liable for the negligence of other agents of his principal.

In *Caldarola v. Eckert,* 67 S. Ct. 1569, 91 L. Ed. 1566 (1947), the Supreme Court held that even the War Shipping Administration's standard form of general agency agreement (see *Hust v. Moore-McCormack S.S. Co.,* 328 U.S. 708, 90 L. Ed. 1534, 66 S. Ct. 1218 (1946)) did not so identify the general agent with the vessel as to require a state court to impose liability upon it for injury to a longshoreman resulting from a defect of the ship's equipment. In the New York Court of Appeals *(Caldarola v. Moore-McCormack Lines, Inc.,* 295 N.Y. 463, 68 N.E. 2d. 444 (1946)), the court had said (68 N.E. 2d at 444):

"Defendants were not charterers of the vessel nor did they physically operate it. Plaintiff's contention that defendants had a duty to him, to keep the ship in repair, was based on the terms of a 'General Agency Contract' made between defendants and the United States and covering this and other ships, plaintiff relying also on certain governmental 'Regulations' which supplemented and amplified that contract. By the contract and the regulations defendants were appointed agents 'to manage and conduct the business of' those ships. The Appellate Division held that nothing in the arrangements between defendants and the United States made defendants any more than managers of certain aspects of the ship's 'business' and that defendants were not operators of the ship or responsible to third persons for its condition. * * * The Appellate Division cited and applied Cullings v. Goetz, 256 N.Y. 287, at page 290, 176 N.E. 397, at page 398, where Chief Judge Cardozo wrote: 'Liability in tort is an incident to occupation or control'."

The Supreme Court said (67 S. Ct. at 1571):

"We agree that if, on a fair reading of the contract, the control which the Agents had over the vessel is the kind of control which New York requires as a basis of liability to third persons, the New York courts cannot so read the contract as to deny the right which New York recognizes. It is not claimed that an injured party has rights under the agency contract, or that it created duties to third persons. Robins Dry Dock & Repair Co. v. Flint, 276 U.S. 303, 48 S. Ct. 134, 72 L. Ed. 290. *And so the narrow question is whether the Agents were in possession and control of the Everagra.* This is the crucial issue, because liabilty in tort by the Agents for Caldarola's injury would only arise in New York when there is such possession and control of

> premises on which injury occurs, due to negligence in their maintenance. Cullings v. Goetz, 256 N. Y. 287, 176 N.E. 397." (Italics supplied)

The Supreme Court thus squarely decided that under the general agency agreement the general agent was not in "possession and control" of the vessels which it was employed to service. Yet it is only necessary to examine the agreement to see that the general agent is far more closely concerned with the internal management of the vessel than is Furness here. While it would seem that the Supreme Court should, consistently with the *Garrett* case, *supra,* have decided the question of the general agent's liability as one of maritime law (See Note, 35 Cal. L. Rev. 564, 567), it applied the law of New York, except in construing the agency contract.

The choice of law question thus raised was considered in *Vitozi v. Balboa Shipping Co., Inc.,* 163 F. 2d 286 (C.C.A. 1st, 1947), wherein the facts presented the converse of the case at bar. The owner, sued in personam at law by a stevedore seeking recovery for personal injuries, was granted a summary judgment when it showed that the vessel on which plaintiff was injured had been bareboat chartered to a third person, who thus became the owner *pro hac vice.* The court said (163 F. 2d at 289):

> "Certainly if under federal law a demise charter party casts the duties and responsibilities of ownership upon the charterer, under federal law it must cast upon him the duty and responsibility to see to it that the vessel is seaworthy during the term of the charter, even though it may not have been seaworthy at the time when the charter party was entered into. On this reasoning two courts in cases in point have held the ship-

owner not liable. In re New York Dock Co., 2 Cir., 61 F. 2d 777; Muscelli v. Frederick Starr Contracting Co., 296 N.Y. 330, 73 N.E. 2d 536. We consider these cases correctly decided.

"If, however, we are in error in deciding the question of the defendant's liability as one of federal law, and the decision of the Supreme Court in the Caldarola case, supra, requires that its duty to the plaintiff be determined by the law of New York, our decision nevertheless would be the same. The reason for this is that the New York Court of Appeals in the Muscelli case indicated that the result it there reached was required by the law of New York as well as by federal law, and furthermore, in the Caldarola case, [67 S. Ct. 1570] the Supreme Court said: 'In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises'."

Under this approach, the judgment below must be affirmed if, as a matter of both maritime and California law, Furness is not liable to appellant herein. As to both, the law is clear.

Under the maritime law, no demise of the vessel occurs unless her possession and control is transferred to another, whether charterer or some other bailee.

The *indicia* of such a demise are described in *Reed v. U.S.*, 78 U.S. 591, 20 L. Ed. 220 (1870), where it is said, 20 L. Ed. at page 220:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract [assumed], and assume in

> fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. *Donahue v. Kettel,* 1 Cliff., 137; *The Volunteer,* 1 Sumn. 551; *Drinkwater v. The Spartan,* 1 Ware. 153; *Gracie v. Palmer,* 8 Wheat., 605; *Clarkson v. Edes,* 4 Cow., 470; *Taggard v. Loring,* 16 Mass., 336; *Christie v. Lewis,* 2 Brod. & B., 410."

Unless there is a demise, so that a charterer becomes an owner *pro hac vice,* the charterer is not liable to third persons for the defective condition of the ship or for negligence of her crew. This principle was applied in *The Edgar H. Vance,* 284 F. 56 (C.C.A. 9, 1922), cert. den. 260 U.S. 750, 43 S. Ct. 250, 67 L. Ed. 495 (1923), where the charterer of a tug was held not liable to the tow for negligence of the tugmaster. The same result was reached in *The Spokane,* 294 F. 242 (C.C.A. 2, 1923), cert. den. 264 U.S. 583, 44 S. Ct. 332, 68 L.Ed. 861 (1924), wherein an employee of a repair contractor sought to recover for personal injuries received on board a vessel when he slipped and fell because of the greasy condition of the deck. The owner of the vessel had remained in possession, and the time charterer was held not liable. The Court said (294 F. at 245):

> "We do not think the charterer can be held liable, for the reason that it was obligated to furnish the appellee a reasonably safe place to work as argued, for the relation of master and servant did not exist be-

tween them. *The charterer is not liable for failure to clean the deck or remove the oil and grease. It did not have common possession or control of the navigation or operation of the vessel. There was no demise or letting of the vessel itself.* The charter vested in the charterer no possession or custody of the steamer, with the rights or obligations incident to a demise of possession." (Italics supplied)

It is apparent from the record that the connection of Furness with the Fordsdale was not even as close as that of a time charterer. Certainly it could not under any circumstances be deemed an owner *pro hac vice.* The only connection of Furness with the vessel was in arranging the shoreside facilities necessary for her accommodation in California ports.

As to the California law, no state court cases have been found dealing with the liability of persons other than the actual owner for personal injuries occurring on board a vessel.

As to the liability of an owner, see:

Peterson v. Klitgaard, 212 Cal. 516, 299 Pac. 54 (1931).

The well established rules governing liability to third persons as between the owner and possessor of real property furnish a convincing analogy, however. The California cases uniformly support the general proposition that liability is an incident of, and attaches to, control of the particular condition which causes the injury. The lessee in possession is alone liable for injuries caused by a condition arising after his possession commences.

Rider v. Clark, 132 Cal. 382, 64 Pac. 564 (1901);
Oles v. Kahn Bros., 81 Cal. App. 76, 253 Pac. 158 (1927);
Mundt v. Nowlin, 44 C.A. (2d) 414, 112 P. 2d. 782 (1941).

See:

Restatement of Torts, Sections 355, 387.

Furthermore, it is clear under the *Intagliata* case, *supra,* that under California law, the general maritime law governs maritime causes of action, regardless of forum.

Under both state and maritime law, then, liability to third persons for injuries occurring on board a vessel should, and must, rest only on the party having actual possession and control of the vessel.

Appellant says in his opening brief (page 24):

> "That an agent is liable for its own torts in a case of this character and should defend on the merits has been held consistently by the United States Supreme Court."

We agree, of course, that an agent is liable for its own torts. And admittedly the complaint alleges "negligence" of "the defendants," which presumably includes Furness.

But appellant apparently contends that a defendant may never have summary judgment if the complaint alleges his negligence. It is submitted that appellant misapprehends the purpose and effect of Federal Rule of Civil Procedure 56, dealing with summary judgments, which provides in part as follows:

> "(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move

with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*'' (Italics supplied)

In order to recover against Furness, appellant must prove a relationship establishing legal responsibility in Furness for his injury. *Appellant has already had his day in court to establish such a relationship.* By clear and uncontroverted testimony, Furness has shown that it was not in possession or control of the Fordsdale. It follows as a matter of law, whether it be the maritime law or the law of California, that it is not liable to appellant for any injury he may have received on the vessel because of its defective condition or of the negligence of the vessel's crew. Appellant has had ample opportunity to raise issues ''as to any material fact'' affecting Furness' liability and has not done so.

The propriety of a summary judgment in this type of case was considered in *Vitozi v. Balboa Shipping Co., Inc., supra.* In the opinion of the District Court, 69 F. Supp. 286 (D.C. Mass., 1946), it is said at page 289:

> ''Thus it appears on the facts of this case about which there is no genuine dispute that the plaintiff cannot recover in this action against the defendant, whatever other remedies he may have against his employer, the United Fruit Company.'' [United Fruit Company was the demise charterer.]

The Circuit Court agreed that there was no issue as to any material fact.

There being no issue as to any material fact establishing that Furness was not the owner *pro hac vice* of the Fordsdale, and had no legal responsibility for its condition, there can be no question that Furness' motion for summary judgment was properly granted.

CONCLUSION

Against his employer, San Francisco Stevedoring Company, appellant has an ample remedy under the Longshoremen's and Harborworkers' Compensation Act (33 U.S.C.A. Section 901 et seq.). That he has no effective remedy against the vessel is no more unfortunate than in any other case where an aggrieved party cannot obtain local jurisdiction over an adversary.

The court is respectfully requested to affirm the judgment of the court below in all respects.

Dated, San Francisco, June 4, 1948.

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